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Supreme Court, U.S.
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No. 96-418

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

PHILLIP R. POPE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1988, Phillip Pope was hired as the business representative of Knoxville, Tennessee Local 268 of the Office and Professional Employees International Union, AFL-CIO (hereinafter, OPEIU). Previously, he had worked for twenty-eight years in the labor movement in a variety of positions. Although the description for his new job said that "[t]he Business Representative should be a dues-paying member of OPEIU Local 268," membership was not a condition of employment. Nonetheless, Pope, who had always previously been a union member and affirmatively wished to belong to Local 268, voluntarily joined the Local immediately after assuming his new position. JA 142-43, 782-83.[1]

Pope soon learned that the Local had been losing members and experiencing financial difficulties, problems which had not been addressed by the elected leadership. In fact, he discovered that the elected officials had engaged in a variety of conduct in violation of the Union's governing instruments and federal law. App. 3a-4a. When he brought this information to the attention of top OPEIU officials in an effort to secure reforms, they declined to take action against the Local's officers on the ground that OPEIU never, supposedly, "got involved in local politics." But, when Pope shared the information with the Local's members, their dissatisfaction with their incumbent leaders grew, as did his own reputation among the members, many of whom were already demoralized by massive layoffs by their employer, the Tennessee Valley Authority (hereinafter, "TVA").

In the summer of 1989, a Local reform slate of

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[1] "JA" citations are to the Joint Appendix filed with the Court of Appeals. "App." citations are to the lower courts' decisions which are reproduced in the Appendix to the Petition for Certiorari.

candidates was formed in anticipation of new officer elections in December of that year. Pope was selected to head the reform ticket which stood for "making our union responsive to the will of the members which meant probably kicking out most, if not all, of the old officers, bringing our constitution and bylaws up to date like should have been done, running our union the way it should be run, [and] being more responsive to the members problems [and] needs." App. 4a-5a. After word of this slate got out, Pope was confronted by OPEIU International Representative Faye Orr about his intention to run for elective office in Local 268. Although it was not at all unusual for appointed OPEIU business agents simultaneously to hold Local elective office, Orr informed Pope that "there is no way in hell OPEIU will tolerate [your running for office]." App. 5a.

Shortly thereafter, several members of the Local Executive Board sought unsuccessfully to convert Pope to "associate" membership status which would have rendered him ineligible to run for elected office. And then, at a membership meeting on October 16, 1989, one Board member sought to have Pope terminated. However, her motion failed for lack of support; instead, the membership overwhelmingly endorsed a proposal supporting Pope's candidacy for Local President. App. 5a-6a.

Immediately after this meeting, incumbent Executive Board members met with International Representative Orr who counselled them to request OPEIU to place the Local under trusteeship. JA 849-50, 1185-88. By letter dated October 18, 1989, to OPEIU President John Kelly, they requested "immediate intervention" and imposition of a "voluntary trusteeship" on Local 268. JA 1181. On October 25, 1989, Kelly obliged, imposing an "emergency" trusteeship without the benefit of an investigation or a hearing, and OPEIU assumed total control over the Local through an

appointed trustee, Donald Wright. App. 6a-7a. Wright temporarily retained Pope as an employee, but it soon became clear that his days with the Local were numbered.

Several weeks later, Pope asked Wright what it would take to have OPEIU lift its trusteeship. Wright responded: "if you would . . . tell the members that you are not going to run for president, I think we can get this trusteeship over in a hurry." App. 7a. On December 5, 1989, a hearing to determine the need to continue the trusteeship was conducted by OPEIU Vice President Sheridan. International Representative Orr and Trustee Wright presented OPEIU's case in favor of continuing the trusteeship; the Local membership submitted evidence in opposition. App. 9a. Orr testified that the trusteeship was necessary since Pope had failed to stay out of Local politics. JA 269. Prior to issuing his post-hearing report, Sheridan furnished copies of his draft to both Wright and Orr and urged them to feel free to edit it. App. 9a. It subsequently came as no surprise that Sheridan ruled in favor of the trusteeship. Meanwhile, Wright had instructed Pope that he was to give no aid or comfort to Local members who had been calling the trusteeship hearing process a "kangaroo court" and reprimanded Pope for having "continued to be a source of divisiveness within the membership of Local 268." App. 8a.

After the hearing, Wright told Pope that "it would be best for you to move on," "while you've got a chance," "I haven't expelled you yet." App. 9a. When Pope failed to heed this advice, Wright terminated him on February 8, 1990, due to "incompatibility with the Local." App. 9a.[2] Shortly

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[2] OPEIU claims that Pope was terminated for allegedly supporting a membership "legal defense fund" and for improper "use of TVA mail under the union contract. Cert Petn at 8. OPEIU made both arguments (continued...)

thereafter, despite the fact he continued to tender his membership dues, Pope was issued, involuntarily, a membership "withdrawal card," rendering him ineligible to run for office. App. 10a.

In his periodic reports to OPEIU President Kelly, Trustee Wright acknowledged that the "problems in the Local are politically motivated . . . [Pope] is a local 268 member and is planning to run for Local President." JA 1294-95. Immediately after terminating Pope, Wright told Kelly he would give Pope's replacement "a one year contract to influence Pope to move on." JA 1304-05. He went on to "recommend that we not hold nominations immediately, but wait a month or so to let things calm down some while the slate of 'non-Pope' candidates are gaining followers." *Id.*; App. 10a. OPEIU President Kelly testified that the reason he did not lift the trusteeship was because the Local was not yet prepared "to make an intelligent decision . . .. The members were not ready for an election." JA 775-76.

When a slate of "non-Pope" candidates failed to materialize, OPEIU attempted to merge Local 268 into a much larger OPEIU Local in Chattanooga since, in Trustee Wright's words, "it would eliminate the possibility of Pope's reinstatement." App. 10a; JA 1308. Wright subsequently informed Kelly that he had "met with TVA management to get their assistance in preventing Pope and his crew from distributing" literature in opposition to the merger. JA 1309.

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[2](...continued)
to the jury which rejected them. Moreover, the contract language regarding use of the internal TVA mail states: "Mail between TVA and the representatives of recognized unions and mail between representatives or members of recognized unions may be transmitted through TVA interoffice mail." JA 1433.

In November, 1990, after concluding a lengthy investigation of the Local 268 trusteeship, the U.S. Department of Labor informed OPEIU:

> Without conceding that the imposition of the trusteeship was ever valid, the Department's position is that it's (sic) continuation at this time is certainly for no legitimate purpose. In fact, the continuation serves to deprive the membership of Local 268 of the officer election to which it was entitled in December, 1989.

App. 69a. Early the following year, 1991, nearly eighteen months after imposing its trusteeship on Local 268, and just prior to a hearing scheduled on the plaintiff's motion for a preliminary injunction to set aside the trusteeship, OPEIU scheduled officer elections in the Local and eventually turned over the authority for governing the Local to the newly elected officials.[3] App. 47a.

Proceeding in District Court[4]

As the district court stated in its Opinion denying OPEIU's Rule 50, F. R. Civ. P., motion to set aside the judgment, in order for Pope to recover on his claim of unlawful termination as an appointed

> union *employee*, the plaintiff had the burden of proving by clear and convincing evidence that his termination was not based upon any legitimate work-

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[3] The count in plaintiffs' complaint seeking to have the trusteeship lifted was subsequently dismissed on mootness grounds.

[4] The action was filed with the United States District Court for the Eastern District of Tennessee, and tried before a jury pursuant to *Wooddell v. IBEW*, 502 U.S. 93 (1991).

> related reasons; and that, instead, his termination was part of a scheme to suppress dissent within the union. *Finnegan v. Leu*, 456 U.S. 431, 102 S. Ct. 1867 (1982); *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. In other words, the question before the jury was whether or not the action taken against Mr. Pope in discharging him was part of a purposeful and deliberate attempt to suppress dissent within the union. *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. The jury was so instructed and the jury was instructed on the meaning of clear and convincing evidence. *See Cruzan v. Director Missouri Department of Health*, 110 S. Ct. 2841, 2855 n. 11 (1990).

App. 55a. Concerning the trusteeship, the district court explained:

> The jury was told that it was not being asked to judge the validity of the trusteeship and that the evidence concerning the imposition and continuation of the trusteeship was to be considered by the jury solely in connection with determining whether the proffered justification by the defendant for imposing a trusteeship in this case was plausible or whether the defendant actually imposed or continued the trusteeship for the purpose of chilling the plaintiff's free speech and assembly rights and/or his equal right to participate in union affairs and elections. The jury was also charged that the defendant was entitled to deference with regard to its decision to impose the trusteeship . . .. The jury was also charged that in order to establish liability on the plaintiff's claim that the defendant imposed or continued a trusteeship on Local 268 in retaliation for, or to suppress his free speech and assembly rights, or his right to participate

> equally in union affairs and elections, the plaintiff had to prove by clear and convincing evidence that the reasons proffered by the defendant for imposing and continuing the trusteeship were pretextual and that the defendant imposed and continued the trusteeship in bad faith.

App. 62a. *OPEIU did not challenge these instructions on appeal.*

The jury found that OPEIU maintained and utilized its trusteeship over Local 268 for the purpose of implementing a scheme to suppress a budding democratic movement in the Local, and specifically to infringe plaintiff's Title I right of free speech and his right to participate in local union affairs, including the officer elections. *See* 29 U.S.C. § 411(a)(1) and (2). Specifically, it found that Pope's termination was part of that scheme to suppress members' democratic rights; and it found that Pope was "involuntarily removed from union membership in retaliation for the exercise of his [Title I rights]" by virtue of his termination and concomitant issuance of a withdrawal card and awarded him $1 in damages to compensate him for OPEIU's having denied him the due process protections guaranteed by 29 U.S.C. § 411(a)(5). App. 52a-53a (Findings 1, 2, 8, 9).

When denying OPEIU's Rule 50 motion, the district court reviewed evidentiary highlights and concluded that there was sufficient evidence in the record from which a reasonable jury could have arrived at these findings by the "clear and convincing" standard. App. 54a-64a. On appeal, "OPEIU also challenge[d] the verdict as not supported by sufficient evidence." App. 25a. But, "using the same standard used by the district court," the court of appeals "conclude[d] that the jury verdict was supported by sufficient evidence." App. 25a-26a.

OPEIU's Arguments Below

Among the many arguments presented by OPEIU to the court of appeals was its claim that Pope was not a "true rank and file union member" who was entitled to enjoy the protections of the Labor-Management Reporting and Disclosure Act (hereinafter, "LMRDA"). 29 U.S.C. § 401, *et seq.* Moreover, the Union contended, since Pope had been issued, involuntarily, a "withdrawal" card following his termination, he lacked standing as a "member" to sue under the LMRDA.

In the alternative, OPEIU argued that since it had lifted its trusteeship over Local 268 before this action had proceeded to trial, the district court erred by admitting evidence that would permit the jury to evaluate whether the trusteeship had either been imposed, or maintained, for an illicit reason, *i.e.*, in violation of Title III of the LMRDA. 29 U.S.C. § 461, *et seq.* Included within this body of evidence was virtually all of the evidence Pope needed in order to prove -- particularly by the clear and convincing evidentiary standard imposed by the court -- that his termination by OPEIU Trustee Wright was part of a deliberate and concerted campaign by OPEIU to suppress the Title I rights of the Local membership, as well as in retaliation for his having exercised his own free speech right, and right to run for office and to participate in the Local's governance. *See* 29 U.S.C. § 411.

The Court of Appeals' Decision

The court of appeals held that Pope was a "member," as that term is defined in the LMRDA, who was entitled to enjoy the protections of Title I. App. 13a-14a. It held, consistent with the trial court and the jury's findings, that the provision in OPEIU's Constitution governing the issuance of withdrawal cards did "not apply to any member who holds

office in, or is employed by, the international union or one of its locals" and, hence, the Union's issuance of a withdrawal card to Pope was "the equivalent of expulsion from the union." App. 28a.

The court observed that *Finnegan v. Leu*, 456 U.S. 431 (1982), had held that the removal of appointed union officials from office by elected officers did not deprive them of their membership rights or otherwise constitute "discipline" under § 609 the LMRDA, 29 U.S.C. § 529, while reasoning that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." App. 15a, quoting from *Finnegan*, 456 U.S. at 441.

The court went on to observe that in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), this Court had subsequently held that "a trustee's authority under [LMRDA] Title III ordinarily should be construed in a manner consistent with the protections of Title I." 488 U.S. at 357. And, whether a trustee's "interference with Title I rights gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed and responsive to the will of the union membership as expressed in open, periodic elections.'" 488 U.S. at 354.

The court of appeals observed that this "theme . . . dictate[d] the outcome of both" *Finnegan* and *Lynn*. And, while noting that neither case was on all fours with Pope's case, the court concluded that the underlying goal "of ensuring democracy is furthered by allowing Pope a cause of action under the LMRDA." App. 17a. And, the court held, "Pope is entitled to protection under the LMRDA because he was disciplined in a manner which affected his right to fully

enjoy the rights and privileges of union membership."[5] App. 17a.

The court of appeals rejected OPEIU's argument that once a trusteeship had been lifted, the evidence regarding its imposition or maintenance became inadmissible in a Title I action for damages. App. 21a-22a. The court recognized that if the lawsuit had been brought under Title III, seeking only to enjoin the trusteeship, once it had been lifted "there is no longer any relief to be had." App. 21a.[6] However, the court pointed out, "Pope is not simply seeking to lift a trusteeship or declare a trusteeship invalid after it has been lifted. * * * Rather, this is an action to recover damages for the suppression of Title I rights . . .." App. 21a. Further, the court reasoned that OPEIU's position was untenable:

> If evidence regarding the imposition or maintenance of a trusteeship after it has been lifted were inadmissible, national and international unions could impose trusteeships with impunity, including as a means to suppress Title I rights, and remain immune from legal scrutiny as long as they lifted the trusteeship before the plaintiff has his day in court. The Supreme Court has expressed its view that Title I individual rights are not suspended during a trusteeship. If the OPEIU's position were to prevail, Title III would trump Title I rights.

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[5] In neither *Finnegan* nor *Lynn*, were the officers who were removed from union office also deprived of their membership rights, *e.g.*, the right to attend meetings, to vote, to run for elective office, etc.

[6] In their original complaint, Pope and a number of other Local 268 members had sought, *inter alia*, to have the trusteeship enjoined. However, once OPEIU "voluntarily" lifted the trusteeship, this count in the plaintiffs' complaint became moot and was dismissed.

App. 20a-21a.

REASONS FOR DENYING THE WRIT

Introduction

Although this case was tried by a jury, and despite the fact OPEIU did not except to the jury instructions, its Petition for a Writ of Certiorari is predicated on factual representations which are flatly inconsistent with the findings below. Further, as we shall presently demonstrate, OPEIU has grossly distorted the rulings of lower courts in its attempt to create the appearance of conflicts among the circuits where none, in fact, exist.

I. The Decision Below Neither Conflicts With Any Other Decision Nor Constitutes Interference With The Right Of Unions To Establish Reasonable Membership Rules.

Having unlawfully terminated Pope as part of a deliberate scheme to suppress democracy in Local 268, and to interfere with Pope's Title I right to participate in the affairs of the Local, OPEIU nonetheless contends that once Pope was no longer "employed" by the Union it was required by its Constitution to issue him a withdrawal card. And, once Pope was no longer an active member, OPEIU contends that he lacked standing to sue under the LMRDA to remedy OPEIU's infringements of members' Title I rights, including his own right of free speech, and right to participate in the governance of Local 268.

Suffice it to say that the court of appeals examined the provision in OPEIU's Constitution which allegedly compelled the Union to issue Pope a withdrawal card, and thus to deprive him of standing to sue to redress infringements of the LMRDA, and held that the provision did not apply to Pope;

and OPEIU does not question or seek review of this ruling.[7] The provision in OPEIU's Constitution, like similar provisions in many international union constitutions, requires the issuance of withdrawal cards to members no longer working "at the trade," *i.e.*, for an employer under contract with the Union; *but*, the OPEIU provision explicitly excepts "any member who holds office in, or is employed by, the International Union, [and] any of its Local Unions or Councils . . .." JA 1257. Further, while OPEIU counsel asserts that the Union's "long-standing, consistent, and reasonable interpretation" (Cert Petn at 12) of its Constitution required issuance of a withdrawal card to Pope, the Union introduced no evidence to demonstrate that it had ever previously, much less uniformly, construed its Constitution to apply to individuals like Pope. To the contrary, the record shows that other Local 268 officials were not issued withdrawal cards after they ceased to be employed by the Local. JA 216, 1185-88, 1195-96.[8]

Nonetheless, OPEIU insists that the Sixth Circuit's decision conflicts with *Yerdon v. Henry*, 152 LRRM 3029 (2d Cir. 1996), and *Reich v. Local 30, International Brotherhood of Teamsters*, 6 F.3d 978 (3rd Cir. 1993). In the first place, neither case involved a claim, as here, for unlawful discipline under § 101(a)(5). 29 U.S.C. § 411(a)(5). In *Yerdon*, the Second Circuit summarily affirmed the district court's

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[7] District Judge Matia dissented on the ground that he believed that the Constitutional provision was properly applied to Pope.

[8] Various courts have held that unions may not, on an *ad hoc* basis, make up or apply rules, or constitutional interpretations, to deprive members of their membership rights, including *inter alia*, the right to sue under the LMRDA. *See, e.g., Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980); *Erkins v. Bryan*, 663 F.2d 1048, 1052 (11th Cir. 1981), *cert. denied*, 459 U.S. 989 (1982); *Agola v. Hagner*, 678 F. Supp. 988 (E.D.N.Y. 1987).

dismissal of a lawsuit brought by a former union employee who had quit her job, claiming emotional distress caused by alleged sexual harassment. While the facts showed that she was eventually issued a withdrawal card, the court did not address, much less resolve, any issue involving issuance of that card.

And in *Reich v. Local 30*, the Third Circuit examined closely the Department of Labor's interpretive regulations applicable to the issuance of withdrawal cards and their effect on the eligibility of candidates for union office in a Title IV action. The court held that the Teamsters' constitutional provision mandating the issuance of cards to members who had been unemployed by a Teamster employer for 6 months was neither unreasonable, nor inconsistent with those rules. This holding, and the Sixth Circuit's holding in the instant case, simply do not conflict.

On the contrary, the Labor Department Rule which the Third Circuit carefully analyzed, 6 F.3d at 986, actually supports the Sixth Circuit's decision below. While upholding union rules requiring candidates to be "working at the trade," the Rule provides, *inter alia*:

> Such a requirement should not be so inflexible as to disqualify those members who are familiar with the trade but who because of illness, economic conditions, or other good reasons are temporarily not working.
>
> *It would be unreasonable for a union to prevent a person from continuing his membership rights on the basis of failure to meet a qualification which the union itself arbitrarily prevents the member from satisfying.*

29 C.F.R. § 452.41 (emphasis added). In the present case,

Pope did not quit a job with an OPEIU employer; nor was he laid off or fired by a third party employer; rather, it was OPEIU which arbitrarily terminated him in order to deprive him of his membership rights, particularly the right to run for elective office. No court has ever sanctioned such conduct and the law clearly forbids it.

II. The Decision Below Neither Contradicts *Finnegan* Nor Conflicts With The Rulings Of Other Circuits.

In *Finnegan v. Leu, supra*, this Court held that the termination of an appointed union staff member by a newly elected president did not constitute "discipline" within the meaning of section 609 the LMRDA, 29 U.S.C. § 529, noting that plaintiff's termination did "not impinge upon the incidents of union membership." 456 U.S. at 438. Nonetheless, the Court observed that its "analysis [was] complicated . . . by the fact that § 102, 29 U.S.C. § 412, provide[d] independent authority for a suit against a union based on an alleged violation of Title I of the Act." 456 U.S. at 439. And it explicitly left "open the question whether a different result might obtain where the dismissal was "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," citing *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973). 456 U.S. at 440-41 and n.11. But, given "the Act's overriding objective . . . to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections," the Court held that "the ability of an elected union president to select his own administrators [was] an integral part of ensuring a union administration's responsiveness to the mandate of the union election" and affirmed dismissal of the plaintiff's action. 456 U.S. at 441.

OPEIU is simply incorrect when it asserts that

Finnegan gives unions *carte blanche* to terminate staff even where part of a deliberate scheme to suppress members' Title I rights. As we have seen, the Court was very careful to leave the door open for different results where necessary to promote Congress' overriding objective of achieving democracy in unions. Indeed, in *Sheet Metal Workers v. Lynn*, this Court subsequently considered the termination, not of an appointed official, but rather of an elected officer, where the termination was ordered not by a newly elected president, but rather by an appointed international union trustee; and in that case, the Court held that the officer's termination constituted a violation of Title I.

Pope's situation was far more analogous to the facts in *Lynn*, than those in *Finnegan*. Of course, in neither *Finnegan*, nor *Lynn*, did the defendant union go so far as did OPEIU in the instant case by depriving the discharged official not only of his livelihood, but also of all priviliges of membership. Moreover, as the jury found below, by clear and convincing evidence, OPEIU and its appointed trustee were engaged in a very deliberate, systematic campaign to undermine democracy in Local 268, to prevent the Local electorate from expressing itself, and to deny them the opportunity to elect a candidate they supported, but whom the parent union opposed -- all in blatant violation of Title I. In affirming, the Sixth Circuit carefully followed the teachings of *Finnegan* and *Lynn* and focused on the "overriding objective" to foster and protect union democracy, taking into account this Court's concern, expressed in *Finnegan*, that unions might "utilize dismissal from union office as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union." 456 U.S. at 441.

Finally, while OPEIU also claims that the decision below conflicts with rulings by other circuits, it draws our attention only to a line of decisions by the Second Circuit,

anticipated in *Finnegan*, which have held uniformly that where a Title I plaintiff can demonstrate by clear and convincing evidence that her removal from union office was part of a purposeful and deliberate scheme to suppress dissent, she is entitled to relief. *See, e.g., Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973); *Cotter v. Owens*, 753 F.2d 223 (2d Cir. 1985); *Johnson v. Kay*, 860 F.2d 529 (2d Cir. 1988); *Franza v. Teamsters Local 671*, 869 F.2d 41 (2d Cir. 1989). The lower courts did not depart from this line of authority here; rather, they embraced and followed it. *See* App. 55a. And, as we have seen, *supra* at 5-6, the jury was properly instructed to apply this line of authority and OPEIU did not challenge the instruction below.

III. Pope's Title I Cause Of Action Was Not Mooted When OPEIU Lifted Its Trusteeship; And By Upholding The District Court's Admission Of Evidence Relevant To That Cause of Action The Court of Appeals Did Not Rule In Conflict With Decisions Of Other Circuits Or In A Manner That Was Inconsistent with the LMRDA.

OPEIU contends that whenever a union has lifted its trusteeship before an LMRDA action goes to trial, the conduct surrounding imposition and maintenance of the trusteeship suddenly becomes off-limits, beyond the scrutiny of a court or jury. But, the court of appeals declined to buy OPEIU's proffered doctrine on the grounds that to do so would grant unions unfettered license to undermine democratic local union autonomy and the remedial objectives of the LMRDA; to do so, the court observed, would effectively permit parent unions to impose blatantly unlawful trusteeships with impunity, and then lift them, as here, shortly before suits challenging their unlawful conduct were scheduled to be heard. In fact, given pretrial discovery, the criminal docket, and the overall caseload burdening federal courts, by the time ordinary

LMRDA cases work their way to the top of a judge's trial docket, there is an excellent chance the trusteeship will have been lifted in any event.[9] Either way, under OPEIU's postulation of the law, once a union lifts its trusteeship, it would succeed in placing its unlawful conduct beyond the reach of the law.

OPEIU asserts that *Laborers Int'l Union v. Mail Handlers*, 880 F.2d 1388 (D.C. Cir. 1989), and *Airline Stewards & Stewardesses Ass'n v. Transp. Wkrs Union*, 334 F.2d 805 (7th Cir. 1964), conflict with the decision below. However, these two decisions hold no more than what the Sixth Circuit correctly noted below: "When a plaintiff sues for injunctive and/or declaratory relief[,] once a trusteeship has been lifted, obviously there is no longer any relief to be had" and there no longer exists a "case or controversy" under Article III of the U.S. Constitution. App. 21a. These two cases do not, however, support OPEIU's proposition that "questions concerning the validity of the purposes for which [a trusteeship] was imposed or maintained" become moot *in a Title I action for damages* after the trusteeship has been lifted.[10]

Whenever a valid claim has been stated, a claim for which relief can still be afforded *after* a trusteeship has been

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[9] After 18 months, trusteeships are presumptively unlawful. *See* 29 U.S.C. § 464(c). Moreover, competent counsel can always arrange with his union clients to lift trusteeships, as here, just before the law finally appears to be catching up to them.

[10] In *Air Line Stewards*, in addition to holding that the union's termination of its trusteeship mooted the Title III claim for injunctive relief, the court separately held that the removal of an elective officer did not state a claim under § 101(a)(5) where the officer had failed to allege deprivation of any membership rights. The instant case, of course, challenged OPEIU's deprivation of Pope's membership rights. App. 16a-17a.

lifted, simply because that claim is based, in whole or in part, on the validity of the trusteeship does not destroy the "case or controversy;" so long as there is relief that can still be granted, the claim survives the trusteeship's termination. *See, e.g., Carpenters v. Dale*, 118 LRRM 3160 (C.D.Cal. 1985), cited approvingly in *Sheet Metal Workers v. Lynn, supra*, 488 U.S. at 357.[11]

IV. In An Action At Law For Damages, There Was Nothing Improper About Allowing A Jury To Determine Whether A Trusteeship Was Employed As An Illicit Vehicle For Inflicting Injuries.

In its final argument, OPEIU contends that "allowing a jury to decide Title III issues in a Title I damages case after a trusteeship is over risk[s] serious incursions on union self-governance" since the jury could "assess in hindsight the propriety of a terminated trusteeship." Cert Petn at 29. Simply because most prior trusteeship issues have been

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[11] In *Carpenters*, the court ordered an international union found to have imposed an unlawful trusteeship to reimburse monies to the local members and to forego collection from the local of per capita taxes. *See also* 29 U.S.C. § 464(a) authorizing courts finding that Title III violations have occurred, and where the violations have not been fully remedied, to "award such relief (including injunctions) as may be appropriate." Clearly, injunctions were not the only form of relief made available. *See also* 29 U.S.C. § 466: "The rights and remedies provided by this title shall be *in addition to any and all other rights and remedies at law or in equity*." (Emphasis added.)

To the extent that the Tenth Circuit's opinion in *Gesink v. Int'l Ass'n of Machinists*, 831 F.2d 214 (10th Cir. 1987), may have held that damages are not available under Title III, we submit that it is in error. More important for current purposes, however, *Gesink* is consistent with the Sixth Circuit's decision below inasmuch as the Tenth Circuit held that damages are available under Title I to an official wrongfully terminated by a trustee.

reviewed by courts sitting in equity, when assessing whether to award injunctive relief under Title III, does not stand for the proposition that Congress intended to forbid juries from awarding damages in Title I cases where trusteeships were improperly imposed.[12]

In fact, this Court has expressly held that union members suing for money damages under Title I are entitled to jury trials. *Wooddell v. IBEW*, 502 U.S. 93 (1991). Pope sought damages against OPEIU for violation of his Title I rights and he was accordingly entitled to a jury trial. Indeed, OPEIU did not object to his jury request. Thus, while *Wooddell*, and OPEIU's failure to object, are dispositive of this issue which OPEIU seeks now to have the Court review, anew, because the Union also makes a sweeping policy-oriented argument to the effect that Congress intended to forbid juries to consider trusteeship issues, we will address that claim briefly.

When enacting the LMRDA, Congress never suggested that it intended to let unions off the hook for the consequences of unlawful trusteeships. To the contrary, Congress intended to put the brakes on the imposition of abusive trusteeships "used as a means of consolidating the power of corrupt union officers . . . *and preventing the growth of competing political elements within the organization.*" *Sheet Metal Workers v. Lynn, supra*, 488 U.S. at 356 n.8 (1989), quoting from S. Rep. No. 187, 86th Cong., 1st Sess., 17 (1959), emphasis in original. Hence, even if OPEIU's dire

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[12] OPEIU complains that "no court in the Sixth Circuit would have found this [Local 268] trusteeship improper" in light of *Teamsters Local 406 v. Crane*, 848 F.2d 709 (6th Cir. 1990). Cert Petn at 29 n.11. Of course, both the District Court and the Sixth Circuit, itself, did just that in the instant case when rejecting OPEIU's various motions and arguments based on *Crane*.

predictions were to be realized, and juries in future Title I (or Title III) actions for damages are allowed to determine whether parent unions imposed unlawful trusteeships, Congress' "overriding objective" of promoting union democracy would be enhanced, not undermined.[13]

If courts are to promote this objective and prevent autocratic union officials from abusing trusteeships to suppress democratic rights and processes and prevent the growth of competing political elements, courts must be able to consider the conduct of parent unions when imposing or administering trusteeships, whether under Title III or Title I, whether before or after a trusteeship has been lifted, and to hold them accountable for any conduct that may have been unlawful and award damages, when sought, to remedy violations and thus to discourage future misconduct. *See* Comment, *The Trusteeship Imbroglio*, 71 Yale L.J. 1460, 1511-17 (1962); Beaird, *Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act*, 2 Ga. L. Rev. 469, 523 (1968).

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[13] While *Wooddell* upheld the right to jury trials in Title I actions seeking damages, inasmuch as Congress used the identical language authorizing the award of "such relief (including injunctions) as may be appropriate" in both Titles I and III, there should be no impediment to juries awarding damages, where sought, in Title III actions either. *Compare* 29 U.S.C. § 412 *with* 29 U.S.C. § 464(a).

CONCLUSION

For the foregoing reasons, OPEIU's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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